Department of Justice

STATEMENT

OF

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ON

EXECUTIVE PRIVILEGE

BEFORE

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
GOVERNMENT OPERATIONS COMMITTEE
HOUSE OF REPRESENTATIVES

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Mr. Chairman: I am pleased to appear before the Committee as the Attorney General's representative to testify on the constitutional questions involved in the doctrine of executive privilege, and on the extent of compliance within the executive branch with President Nixon's memorandum of March 24, 1969, establishing a procedure to govern compliance with congressional demands for information.

Because the Subcommittee's inquiry is a wide ranging one, it may be helpful if I outline what I conceive to be three related but different situations, all of which have recently received considerable public notice, and all of which are doubtless of interest to the Subcommittee.

The doctrine of executive privilege, as I understand it, defines the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. This doctrine is implicit in the separation of powers established by the Constitution.

Related to the doctrine of executive privilege, but by no means coextensive with it, is the classification of material in the possession of the executive branch under the provisions of Executive Order 10501, as amended by Executive Order 10964. These Executive Orders establish rules governing the classification of documents involving national defense information, and prohibit disclosure by executive branch personnel of documents so classified to anyone not authorized to receive them. The Freedom of Information Act, which may be said to have established a "right to know" on the part of the public, exempts from its disclosure requirements "matters that are . . . specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy". This exemption in the Freedom of Information Act justifies refusal on the part of the Executive to make classified material available to the general public. But the mere fact of classification by itself does not constitute a sufficient basis for withholding information from a committee of Congress, since most, if not all, congressional committees themselves are fully authorized to receive classified documents.

Thirdly, and particularly in the public eye now, is the extent of the authority of the executive branch to seek the aid of the judicial branch in preventing or punishing the publication of material where such publication would be dangerous to the national security. By hypothesis, in this third situation, the material in question is already in the hands of thepotential publisher, so there is no question of the Executive being compelled to furnish it in order that it may be published. It is this question, of course, which has been the subject of the current litigation in the cases involving the New York Times and the Washington Post.

I will devote my testimony primarily to the question of executive privilege, since that is what the Attorney General and I understand that you wish, Mr. Chairman. I will, to the extent of my ability, be happy to respond to questions about any other matters which are within my competence.

The Constitution nowhere expressly refers either to the power of Congress to obtain information in order to aid it in the process of legislating, nor to the power of the Executive to withhold information in his possession

the disclosure of which he feels would impair the proper exercise of his constitutional obligations. Nonetheless, both of these rights are firmly rooted in history and precedent.

It is well established that the power to legislate implies the power to obtain information necessary for Congress to inform itself about the subject to be legislated, in order that the legislative function may be exercised effectively and intelligently. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

The right of the Executive to withhold certain types of information from the other coordinate branches has been equally well recognized. In Reynolds v. United States, 345 U.S. 1, the Supreme Court upheld the applicability of such a privilege against judicial subpoena. The claim of the Executive to withhold this type of information from Congress goes back to the administration of President Washington. In 1792, the House of Representatives embarked on its first effort to investigate the conduct of the executive branch in connection with the ill-fated expedition of General St. Clair into the Northwest Territory. When demand was made upon the Secretary of War for the

production of all papers connected with that expedition, President Washington called upon his Cabinet for consultation "because it was the first example and he wished that as far as it should become a precedent, it should be rightly conducted . . . He could readily conceive that there might be papers so secret a nature as they ought not to be given up."

The Cabinet concluded unanimously on April 2, 1792 that the House of Representatives had the right to institute inquiries and that it might call for papers generally and "that the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion." The Writings of Thomas Jefferson (Ford Ed., 1892) Vol. I, pp. 189-190. President Washington determined that in this particular instance the disclosure of the papers would not be contrary to the public interest and instructed the Secretary of War to make the papers requested available to the House of Representatives. The Writings of George Washington (GPO Ed., 1939) Vol. 32, p. 15.

In 1796, in connection with the appropriation of the funds required to carry out the financial provisions of the Jay Treaty, the House of Representatives requested the President to produce the instructions to the minister who negotiated that treaty. This time President Washington advised the House that he could not comply with its request. He explained:

"* * *

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolite; for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members."

"* * *

"As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is

> essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request." Richardson, Messages and Papers of the Presidents, Vol. I, pp. 194-196.

Since that time virtually every President had occasion to determine whether the disclosure of information to Congress was appropriate.

The Supreme Court in United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-321 (1936), based its decision in part on the authority of the President to withhold information in the field of foreign relations from Congress, and refers to some of the instances when Congress acknowledged this authority in the President. The disputes between Congress and the Executive over the invocation of executive privilege have not been so much about the existence of the authority, as they have about the extent and manner in which it is exercised. The President's authority to withhold information is not an unbridled one, but it necessarily requires the exercise of his judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest. As is the

case with virtually any other authority, it has a potential for abuse; but as in the case of other authorities, the potential for abuse has never been deemed a sufficient reason for denying the existence of the authority.

The doctrine of executive privilege has historically been pretty well confined to the areas of foreign relations, military affairs, pending investigations, and intra-governmental discussions. I will mention some pertinent examples, and attempt to indicate the reasoning behind the claim of privilege in each of these fields.

A report of the Foreign Relations Committee pointed out as early as 1816 that:

> "The nature of trans actions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends upon secrecy and dispatch. (Quoted in United States v. Curtiss-Wright Corp., 299 U.S. 304 at 319 (1927). (Emphasis supplied.)

Congressional recognition of the power of the executive branch to withhold information in the field of foreign relations is also evidenced by the time-honored formula of resolutions of inquiry. Such resolutions normally direct or require a department head to submit the requested information to Congress. Resolutions of inquiry directed to the Department of State in matters of foreign relations,

however, request the Secretary to furnish the information 'if not incompatible with thepublic interest." See Cannon, Procedure in the House of Representatives, H. Doc. 610, 87th Cong., 2d Sess., p. 219; Curtiss-Wright, supra, at 321. In the Senate, this practice goes back to the days of Daniel Webster. (See 38 Cong. Rec. 1307, Sen. Collum.) This formula constitutes a courteous recognition of the authority of the Executive Branch to withhold from Congress in the fields of foreign relations information the disclosure of which would be inconsistent with the public interest. It has been conceded that the Executive would have the same power if that clause were missing. Senator Teller, in discussing such a resolution in 1905, said:

> "* * * But the President is not bound at all by a failure to put in that phrase. If he thinks it is incompatible with the public interest, it is his right so to state to the Senate, and the Senate has always bowed to such a suggestion from the Executive." 40 Cong. Rec. 22.

The congressional recognition of executive privilege, of course, is not restricted to foreign relations. In 1906, Senator Spooner explained on the floor of the Senate that cases in which the President is authorized to withhold

information from Congress were not limited to foreign relations but they included among others military information which could be of use to an enemy, and confidential investigations in the various departments of the government. 41 Cong. Rec. 97-98.

More recently, in 1944, the Chairman of the Select House Committee in an investigation of the Federal Communications Commission, recognized in principle that:

> "for over 140 years a certain exemption [from the duty to testify before Congress] has been granted to the executive departments, particularly where it involves military secrets or relations with foreign nations." Hearings before the Select House Committee to Investigate the Federal Communications Commission, 78th Cong., 1st Sess., p. 2305.

And, in connection with the U-2 incident, the Senate Foreign Relations Committee recognized that with respect to intelligence operations:

> "the administration has the legal right to refuse the information under the doctrine of executive privilege." S. Rept. 1761, 86th Cong., 2d Sess., p. 22.

There is another category of situations in which Congress has recognized the validity of claims of executive privilege. They center around what may be called the freedom of the

executive branch from legislative interference. It includes the confidentiality of conversations with the President, of the process of decision making at a high governmental level and the necessity of safeguarding frank internal advice within the executive branch. Here, too, I will advert to some examples.

During the investigation into the circumstances surrounding the dismissal of General MacArthur held by the Senate

Committees on Armed Services and Foreign Relations in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential adviser. The late Senator Russell, the Committee Chairman, recognized that claim of privilege. When that ruling was challenged, the Committee upheld it by a vote of 18 to 8. Military Situation in the Far East, Hearings before the Committee on Armed Services and the Committee on Foreign Relations, United States Senate, 82d Cong., 1st Sess., pp. 763, 832-872.

During an investigation conducted in 1962 into Military Cold War Education and Speech Review Policies, President Kennedy, by letters dated February 8 and 9, 1962, directed the Secretaries of Defense and State not to disclose to the Committee the names of any individual with respect to any particular speech reviewed by him. He explained that the changes made in those speeches were made under the Secretaries' policies and guidelines and that the Secretaries had accepted responsibility for those changes. In these circumstances,

> "it would not be posssible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice."

The Chairman of the Subcommittee, Senator Stennis, upheld the claim of privilege. Military Cold War Education and Speech Review Policies, Hearings before the Special Preparedness Subcommittee of the Committee on Armed Services, United States Senate, 87th Cong., 2d Sess., pp. 508-513, 725.

Finally the Executive Branch has repeatedly withheld from Congress what may generally be referred to as "open investigative files," compiled by the Executive in taking care that the laws enacted by Congress be faithfully executed. It was in response to a request from Congressman Fountain, Chairman of the Intergovernmental Relations Subcommittee of this Committee, that the President through the Attorney General invoked executive privilege in June of last year. The Intergovernmental Relations Subcommittee had requested certain investigative reports prepared by the Federal Bureau of Investigation which had been furnished

to the Department of Health, Education and Welfare for the purpose of evaluating scientists nominated to serve on advisory boards. The Attorney General respectfully declined the Subcommittee's request, and stated in his letter:

> "This invocation of privilege is being made with the specific approval of the President."

The principal precedent for such refusal is the Opinion of Attorney General Robert H. Jackson rendered to President Franklin Roosevelt in 1941, 40 Op. A.G. 45 (1941).

Attorney General Jackson's opinion was in response to a request from Chairman Carl Vinson of the House Committee on Naval Affairs that the Committee be furnished with all "future reports, memoranda, and correspondence of the Federal Bureau of Investigation, and the Department of Justice in connection with 'investigations made by the Department of Justice'" pertaining to labor disturbances taking place in industrial establishments which had naval supply contracts. The Attorney General's refusal of the Committee's request was based on the fact that the supplying of such information could seriously prejudice

law enforcement, by allowing a prospective defendant to know how much or how little information the government had about him, and what witnesses or sources of information it was proposing to rely upon. In addition, the Opinion cited the serious prejudice to the future usefulness of the government's information-gathering agencies, since much of the information was (and is) given in confidence and can only be obtained upon a pledge not to disclose the source. Finally, Attorney General Jackson said that disclosure "might also be the grossest kind of injustice to innocent individuals," since the reports included "leads and suspicions, and sometimes even the statement of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that the correction never catches up with an accusation."

The privileged nature of investigatory information was recognized during the Army McCarthy hearings of 1954 by Chairman Mundt's ruling:

> "The Chair is prepared to rule. He unhesitatingly and unequivocally rules that in his opinion, and this is sustained by an unbroken precedent so far as he knows before Senate investigating committees, law-enforcement officers, investigators, any of those engaged in the investigating field, who come in contact with confidential information, are not required to disclose the source of their information. The same rule has been followed by the FBI and in my opinion very appropriately so." Special Senate Investigation, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess., p. 770.

The principle of Executive privilege has been applied by Presidents in the past not only to the furnishing of documentary information, but to the refusal on the part of the President's intimate advisors to appear as witnesses before committees of Congress. Thus, Presidential Assistant John Steelman in the Truman Administration, Presidential Assistant Sherman Adams in the Eisenhower Administration, Presidential Assistant DeVier Pierson and Under Secretary of the Treasury Joseph Barr in the Lyndon Johnson Administration, all refused requests of congressional committees that they testify, grounding such refusal on the principle that they ought not to be interrogated as to conversations or discussions had with the President, or advice or recommendations made to the President.

The reasoning behind the claim of executive privilege in these four classical categories seems to me to be as thoroughly defensible in principle as it is well established by precedent. In the field of foreign relations, the President is, as the Supreme Court said in the Curtiss-Wright case, the "sole organ of the nation" in conducting negotiations with foreign governments. He does not have the final authority to commit the United States to a treaty, since such authority is reposed in the United States Senate; but the frequently delicate negotiations which are necessary to reach a mutually beneficial agreement which may be embodied in the form of a treaty often do not admit of being carried on in public. Frequently the problem of overly broad public dissemination of such negotiations can be solved by testimony in executive session, which informs the members of the committee of Congress without making the same information prematurely available throughout the world. The end is not secrecy as to the end product --the treaty-- which of course should be exposed to the fullest public scrutiny, but only the confidentiality as to the negotiations which lead up to the treaty.

The need for extraordinary secrecy in the field of weapons systems and tactical military plans for the conducting of hostilities would appear to be self-evident. At least those of my generation and older are familiar with the extraordinary precautions taken agains revelation of either the date or place of landing on the Normandy beaches during the Second World War in 1944. The Executive Branch is charged with the responsibility for such decisions, and has quite wisely insisted that where lives of American soldiers or the security of the nation is at stake, the very minimum dissemination of future plans is absolutely essential. Such secrecy with respect to highly sensitive decisions of this sort exclude not merely Congress, but all but an infinitesimal number of the employees and officials of the Executive Branch as well.

I have summarized earlier in my testimony the reasons given by Attorney General Jackson, and reaffirmed by Attorney General Mitchell, as to the need for confidentiality of open investigative files.

Finally, in the area of executive decision making, it has been generally recognized that the President must be free to receive from his advisors absolutely impartial

and disinterested advice, and that those advisors may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed either by Congress, by the press, or by the public at large. Again, the aim is not for secrecy of the end product--the ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will be a sounder one if the President is able to call upon his advisors for completely candid and frequently conflicting advice with respect to a given question.

I would add, finally, that the integrity of the decision-making process which is protected by executive privilege in the Executive Branch is apparently of equal importance to the Legislative and Judicial branches of the government. Committees of Congress meet in closed session to "mark up" bills, and judges of appellate courts meet in closed conference to deliberate on the result to be reached in a particular case. In each of these instances, experience seems to teach that a sounder end result--which

will be the fullest object of public scrutiny--will be reached if the process of reaching it is not conducted in a goldfish bowl. Indeed, if additional precedent were warranted,the decision of the Founding Fathers to conduct in secret all of its deliberations at the Constitutional Convention of 1787, appears to be very much in point.

While reasonable men may dispute the propriety of particular invocations of executive privilege by the various Presidents during the nation's history, I think most would agree that the doctrine itself is an absolutely essential condition for the faithful discharge by the Executive of his constitutional duties. It is, therefore, as surely implied in the Constitution as is the power of Congress to compel testimony.

You have also asked me to discuss the extent of the compliance by executive departments and agency heads of the instructions contained in President Nixon's memorandum establishing a procedure to govern compliance with congressional demands for information. While your letter dates that memorandum as of April 7, 1969, the document is actually dated March 24, 1969.

The procedure set forth in that memorandum is simple. It provides in effect that if a department or agency head believes that a request for information from a congressional agency raises a substantial question as to the need for invoking executive privilege, he shall consult the Attorney General through the Office of Legal Counsel. If, as the result of that consultation, the department or agency head and the Attorney General agree that executive privilege shall not be invoked, the information shall be released. If the department head and the Attorney General agree that executive privilege shall be invoked, or if either of them believes that the issue shall be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

If the President decides to invoke executive privilege, the department head shall advise the congressional agency that the claim of executive privilege is made with the specific approval of the President. The fifth paragraph of the memorandum provides that pending the procedure previously outlined, the department head should request

the congressional agency to hold the request for information in abeyance, making it clear, however, that while the purpose of this request is to protect the privilege pending the Presidential determination, it does not constitute a claim of privilege.

From our experience, agencies are complying with that procedure. I have already referred to the request made by Congressman Fountain (as Chairman), for the FBI records, which was handled in the Executive Branch in accordance with the procedures outlined in the President's memorandum. With respect to other matters that have been referred to us, it is our observation that the agencies which seek to withhold information are complying with the procedures set forth in the memorandum.

I appreciate that some misunderstanding may arise in the actual handling of the demand for information when the department head believes it raises the question of privilege. Just as the ultimate decision as to whether to invoke executive privilege is that of the President, the ultimate decision as to whether to demand information is that of

the chairman of the committee or subcommittee of Congress involved. Frequently, however, contacts between the Legislative and Executive branches are initiated on a lower level, with staff people on both sides engaging in a discussion of what they conceive ought to be furnished. Frequently, such discussions, involving staff personnel only or on occasion involving the chairman of the congressional committee or subcommittee and the head of the department or agency, result in sufficient give and take on both sides so that no "confrontation" occurs. I believe that this procedure is entirely appropriate since it obviates unnecessary clashes between the President and Congress. When an Executive Branch agency consults with the Department of Justice pursuant to the President's memorandum, we have on occasion suggested that the department head try to discuss the matter with the committee chairman involved, with a view to reaching agreement as to what is and is not to be furnished. It may be that in some instances chairman have misconstrued such negotiations as a claim of privilege, and did not realize that they had constituted an attempt to settle a potential dispute in a mutually satisfactory manner, and

thereby to obviate the necessity for the President to determine whether or not privilege should be invoked.

President Nixon is firmly of the view, as indicated in his March 24, 1969 memorandum, that the claim of executive privilege must have his express approval, and that it is not to be made by anyone other than him. Occasionally, of course, in testimony before a commitee, or in discussions as to documents to be produced before a committee, some official of the Executive Branch may feel that a particular question or a particular demand raises a question of executive privilege. He may feel obligated to so state to the committee chairman or his representative; but such a statement, of course, is by no means tantamount to the President's authorizing the claim of privilege. It is simply a statement by a department head or his representative that he is prepared to recommend a claim of privilege to the President should the demand for information not be settled in a mutually satisfactory manner to both the agency and the chairman of the committee or subcommittee involved.